Supreme Court, U.S.
F I L E D
SEP 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2080

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

LOUIS PUCCINI, P.A.
ORESTE LOUIS PUCCINI, JR.
COUNSEL OF RECORD
ROSE LITTLE
8015 MOUNTAIN ROAD PLACE, N.E.
SUITE 200
ALBUQUERQUE, NEW MEXICO 87110
(505) 255-0202
COUNSEL FOR PETITIONER

MONTGOMERY & ANDREWS, P.A.
JEFFREY R. BRANNEN
NANCY M. KING
SARAH M. SINGLETON
POST OFFICE BOX 2307
SANTA FE, NEW MEXICO 87504-2307
(505) 982-3873
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION 1

REPLY TO THE RESPONDENT'S STATEMENT OF CASE 2

REPLY TO POINT ONE 6

PURSUANT TO CASE LAW THE ISSUE REGARDING THE VIOLATION OF THE AUTOMATIC STAY CAN BE RAISED AT ANY POINT OF LITIGATION . . . 6

REPLY TO POINT TWO OF RESPONDENT'S BRIEF IN OPPOSITION 11

BRC WAIVED JURY TRIAL ONLY ON THE ISSUE OF THE AMOUNT OF THE DEBT OWED TO LILCO 11

REPLY TO POINT TWO CONCERNING TRIAL COURT'S FINDINGS AND CONCLUSIONS 12

TABLE OF AUTHORITIES

Cases	Page(s)
11 U.S.C. Section 362 (1982 and Supp. V., 1987)	7, 10
In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir. 1984)	8
Zestee Foods, Inc. v. Phillips Foods Corp., 536 F.2d 334 (10th Cir. 1976)	8
Meyer v. Rowen, 181 F.2d 715, at 716 (10th Cir. 1950)	8
State Distributors, Inc. v. Glen Moore Distilleries Company, 738 F.2d 405, 412 (10th Cir.1984)	13

No. 88-2080

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

BOKUM RESOURCES CORPORATION,

Petitioner,

v.

LONG ISLAND LIGHTING COMPANY,

Respondent.

PETITIONER'S REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

The petitioner reluctantly files this Reply Brief so as to correct certain misrepresentations made by LILCO in its Brief in Opposition. The statements set out in the petitioner's statement of the case are accurate statements and not set forth to be misleading. The respondent correctly states that the procedural history of

ne present case is complex. etitioner's counsel did not represent RC in this matter until this appeal as taken. Nonetheless, due to the omplexity of this case and the fact hat petitioner's counsel was not nvolved in the litigation of this atter in lower courts, counsel has onsulted with the client and horoughly reviewed the record so as o assure the accuracy of the epresentations to the best of ounsel's ability.

REPLY TO THE RESPONDENT'S STATEMENT OF CASE

LILCO admits that BRC has been and till is in bankruptcy since June 5, 981. To date, the Plan has not been ompleted. Contrary to representations f LILCO, BRC filed its Second Amended lan of Reorganization on January 27, 984, and an order was entered

confirming the Second Amended Plan on August 15, 1984. (Note: This date was erroneously given as 1985 by petitioner on page 15 in its original petition). Due to the circumstances of this debtor, the Court issued an unusual confirmation order which retained jurisdiction so as to administer the estate further in accordance with the Plan "until a final order closing this estate is entered". In accordance with the Plan, over two million dollars has been collected and disbursed to some creditors including LILCO.

Contrary to LILCO's representations, all of the creditors have not been paid, and LILCO is not the only remaining creditor. Respondent has incorrectly stated that "[p]ermitting trial of the counterclaims did not hurt creditors because, apart from LILCO, there are no creditors of any

agnitude." It is important to note hat BRC still has a reasonably large umber of other creditors. BRC, in act, still owes substantial amounts in utstanding debts to these as well as ther creditors. In part, this is why RC is pursuing its claim. BRC would ot have remained in bankruptcy had ILCO paid BRC in 1981 when the tender f uranium was made. BRC would have had successful reorganization had LILCO ot breached its contract. Furthermore, f BRC prevails in this action against ILCO, BRC will be able to pay its total debt to LILCO including the stipulated judgment involved in this case (which was not contested). However, it should be noted that the indebtedness to LILCO was to have been repaid by credits to LILCO from payments made to BRC for uranium purchases.

LILCO incorrectly states that BRC

had no income other than monies provided by LILCO, when in fact, BRC did have other sources of income both before and after the filing of the bankruptcy petition. The respondent alleges in its response that the mortgage foreclosure was stayed in lower court. However, on page two of the respondent's brief, LILCO admits that certain claims were tried before the Bankruptcy Court. Despite the tortured history, a foreclosure order was entered by the U.S. District Court and can be found in the Petition in the Appendix at page A-49. Said order was issued without any motion being filed or order entered modifying the automatic stay, and without any notice to the other lienholders having liens on the same property as LILCO.

LILCO filed suit in the United States District Court for the District

of New Mexico, Case No. CV-80-912HB, against BRC in a foreclosure proceeding on November 10, 1980. On June 12, 1981, LILCO and others filed an involuntary Chapter 11 petition against BRC and an order for relief was entered December 17, 1981. As such, the foreclosure proceeding was filed before the involuntary petition was filed.

REPLY TO POINT ONE

Pursuant to Case Law the Issue Regarding the Violation of the Automatic Stay can be Raised at Any Point of Litigation

The automatic stay has never been lifted so as to allow LILCO to proceed with the mortgage foreclosure. The issue of modifying the automatic stay was never raised in lower court, but the petitioner has never alleged that the issue was raised. In fact, petitioner has cited to various cases which would permit the action to be heard by this Court despite the failure of that issue

being raised in lower court.

11 U.S.C. Section 362 provides protection to the debtor through the automatic stay provision. The purpose of the automatic stay is not only to protect the debtor and its assets, but also to provide protection to the other creditors that an orderly disposition of assets is occurring rather than having the debtor dismembered by a frenzied shark-like attack. Because LILCO has violated the automatic stay, the Court should hold that the lower Court's decision should be set aside.

The failure to raise the issue of violation of the automatic stay in the lower court only magnifies the harm caused to the various secured and unsecured creditors, stockholders and the debtor for which the statute provides protection. The respondent provides on page nine (9), of their

Brief in Opposition, the manner in which they believe the automatic stay should be lifted. Cases are cited by the respondent which provide for the automatic stay to be lifted retroactively. These cites and arguments along with the cites in the Petition for Writ of Certiorari clearly demonstrate the need for the Supreme Court's intervention to resolve the conflicts among the circuits. As cited by respondent, In re Albany, an Eleventh Circuit case, ordered the automatic stay to be lifted retroactively. In re Albany Partners, Ltd., 749 F.2d 670 (11th Circuit, 1984). However, contra, the Tenth Circuit Court held that a judgment rendered in violation of the automatic stay is void and of no effect. Zestee Foods, Inc. v. Phillips Foods Corp., 536 F.2d 334 (10th Cir. 1976); Meyer v. Rowen, 181 F.2d 715, at

716 (10th Cir. 1950). Numerous cites addressing the conflict and finding the order to be in violation of the automatic stay can be found in the petition under point I and II. There exists a true conflict among the circuits which needs to be addressed, including the effect of Bankruptcy Rule 6009, and settled by this Court.

LILCO in its response makes the argument that, had a motion to lift the automatic stay been filed in the lower court, the court would have granted an order lifting the stay. It is irrelevant whether or not the lower court would have lifted the automatic stay. This argument made by the respondent can be analogized with holding in a criminal proceeding that due process is not necessary because evidence favors the defendant's guilt.

Respondent correctly states that

cases are cited by the petitioner which involve litigation pending against the debtor at the time the bankruptcy was filed. This fact pattern fits the case at bar; however, even if the litigation commenced after filing bankruptcy, by a creditor, the automatic stay provided by 11 U.S.C. Section 362(1) would bar such litigation from continuing. As such, this entitles the debtor and the creditors the protection provided by the automatic stay regardless of whether the foreclosure action was filed before or after the bankruptcy.

On page eleven (11) of LILCO's opposing brief, LILCO clearly demonstrates the confusion between the Bankruptcy Rules and the Bankruptcy Code. The respondent correctly states that 11 U.S.C. §362 (1982 and Supp. V, 1987) clearly prohibits entities from proceeding with action against a debtor,

and the property of the estate, once the petition is filed. However, LILCO also states that the Bankruptcy Rule 6009 permits a debtor to commence an action while under the protection of the automatic stay. Such a conflict needs to be addressed by the Court so as to settle a conflict not only among the circuits in its interpretation, but also between the Bankruptcy Rules and the Bankruptcy Code.

REPLY TO POINT TWO OF RESPONDENT'S BRIEF IN OPPOSITION

BRC Waived Jury Trial Only on the Issue of Amount of the Debt Owed to LILCO

Petitioner did not stipulate to waiver of a jury trial on all issues. BRC reserved its rights and did not waive any rights on appeal as found in the Transcript at page 606. This was confirmed by the Court when the District Court Judge stated in the Court's Finding of Fact and Conclusions of Law

that it was "stipulated that LILCO's counterclaim should be submitted to the Court" which can be found in the Petition in the Appendix at page A-51. BRC stipulated waiver of the jury as to that issue only, the amount of indebtedness. The issue in which BRC waived the jury trial was on LILCO's counterclaim as to the debt plus interest demanded by LILCO. BRC conceded its debt to LILCO plus interest and stipulated to such, as found in the record at page 606. The record clearly indicates at page 608 that the only stipulation was to the debt and interest due. BRC did not stipulate to waiver of a jury trial on any other issue, and certainly not on the contract issue.

Reply to Point Two Concerning Trial Court's Findings and Conclusions

LILCO alleges in its response that the findings and conclusions have not

been challenged by the petitioner. However, the petitioner has done just that throughout the appeal proceedings. In its Petition here, and in the appeal to the Tenth Circuit Court, BRC specifically detailed the difference in the Court's findings and the actual evidence. If the Court elects to apply the standard of review set out by State Distributors, Inc. v. Glenn Moore Distilleries Company, 738 F.2d 405, 412 (10th Circuit 1984), the evidence presented by BRC is overwhelming and as such can meet that standard.

The trial court erred in holding as it did because the evidence is contrary to the findings and, hence, the conclusions. For example, LILCO's own witness, Hugh P. Boylan testified that it did not matter where the uranium came from. Boylan clearly testified in his deposition which was read into the

record at p. 588:

> We were negotiating a supply contract with Bokum. Whether that uranium came from the Marquez property or other properties was particularly of no interest to us. We were looking for pounds of uranium over a time period. That's what we were doing.
> (Emphasis added) Tr. at 588.

Boylan later testified that it did matter; however, he was impeached because of his contradictory statements. Nonetheless, the Court of Appeals erroneously relied on the contrary evidence and in fact cited to Boylan's testimony and in its order found in the Appendix of the Petition at page A-41. Said evidence, among the other evidence previously indicated, demonstrates that BRC's interpretation of the contract is accurate, or at the very least there was a fact issue that should have gone to the jury.

As another example, counsel for

LILCO stated at trial:

> That in a response letter by Mr. Bokum that refers back to that original tender, he reiterates that that tender of 2.2 million pounds and adds to it another seventy-one thousand pounds for the following month.
>
> At no time is there a communication in writing or oral between the parties that would indicate that if future contracts--tenders had been made, they would or would not have been rejected. Tr. at 498.

In effect, counsel is saying that if there are no communications in writing, then there is no evidence of a breach. However, it is clear from counsel's statements that LILCO had no intention of accepting any of the uranium. Counsel for LILCO also clearly conceded that the 1976 and 1978 uranium contracts were in full force and effect. Therefore, many factual issues exist which should have been presented to the jury for determination.

For the reasons given above and in the Petition for Writ of Certiorari, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

LOUIS PUCCINI, P.A.

By_____
ORESTE LOUIS PUCCINI, JR.
COUNSEL OF RECORD
ROSE LITTLE
8015 MOUNTAIN ROAD PLACE NE
SUITE 200
ALBUQUERQUE, N.M. 87110
(505) 255-0202
COUNSEL FOR PETITIONER

3436-2/0787C